FILED

No. 73-16

Xerox International Corporation, *Petitioner*

v.

Dr. John L. McLucas,
Secretary of the Air Force, *Respondent*

and

The Bendix Company, *Intervenor-Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

HAYES INTERNATIONAL CORPORATION, *Petitioner*

v.

DR. JOHN L. MCLUCAS,
SECRETARY OF THE AIR FORCE, *Respondent*

and

THE BOEING COMPANY, *Intervenor-Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Hayes International Corporation, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 509 F.2d 247 (5th Cir. 1975), and appears in Appendix A, *infra*, pages 1a-30a. The un-

reported opinion of the United States District Court for the Northern District of Alabama, Southern Division, appears in Appendix B, *infra,* pages 31a-40a.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 6, 1975. On May 24, 1975, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including July 3, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

This case raises issues of national importance with respect to protecting the public interest as required by public policy in the operation and integrity of the federal procurement system. The ultimate legal issue before the Court involves a question of conflict of interest in the award and performance of a Government contract. The potential costs to the American taxpayer resulting from the conflict of interest exceed $200,000,000., which will be harvested by a contractor whose opportunity for biased judgment to enhance its own rewards is encouraged by respondent, Secretary of the Air Force.

The central issue in this case is as follows:

1. Whether the award by respondent of Government contract No. F34601-71-C-3366 to the Boeing Company for maintenance and modification services on the world-wide Air Force KC-135 fleet resulted in an *inherent and illegal conflict of interest;* and whether therefore, contrary to the decision of the Court of Appeals, respondent's action was arbitrary and capri-

cious, without a rational basis, contrary to public policy and to the public interest in maintaining the integrity of the federal procurement system, and contrary to the applicable law.

This case also raises the following subsidiary issues which are related to the ultimate issue set forth above.

2. Whether a *conflict of interest* results from Boeing's performance concurrently of sustaining engineering services under contracts [1] for the Air Force on the KC-135 fleet and its performance of maintenance and modification services on the fleet under contract No. F34601-71-C-3366;

3. Whether Boeing's judgments and engineering decisions under its sustaining engineering contracts for the KC-135 fleet will either be *biased* or provide the *opportunity for bias* in favor of maintenance requirements and modifications which Boeing will concurrently perform and of which Boeing will receive the economic benefit under the maintenance and modification contract (No. F34601-71-C-3366); and

4. Whether the competition for contract No. F34601-71-C-3366 was unfair because of information and opportunities provided only to Boeing by its privileged relationship with the Air Force and its con-

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[1] The Court of Appeals described Boeing's performance under the "sustaining engineering and related support services contracts" as follows:

> "Pursuant to these contracts Boeing had made specific recommendations as to what maintenance and modifications were required on the entire fleet of more than 700 KC-135 aircraft. Boeing continues to operate under these sustaining engineering and related support services contracts. These were awarded to Boeing on a 'sole source' basis without competition or open bidding, . . ." (App. A, p. 6a)

tracts for sustaining engineering services on the KC-135 fleet, and whether Boeing had an *unfair competitive advantage* over the other offerors, including petitioner.

The Court of Appeals never reached the issue of conflict of interest. The court avoided this issue by deciding, erroneously, that the statutes and regulations which prohibit conflicts of interest in federal procurement were *inapplicable* to this case. It further held that there was no public policy which could be enforced judicially to void Government contracts "tainted by such a conflict of interest."[2] (App. A, p. 30a fn. 26) The court relied upon the "administrative interpretation" of the regulations by the respondent, Secretary of the Air Force, to the effect that they were not "meant" to apply to the types of contracts involved in this case.

The decision of the Court of Appeals thus also raised the following issue for review by this Court.

5. Whether the Armed Services Procurement Act of 1947, 62 Stat. 21 (1948), 10 U.S.C. § 2304 *et seq.* (1970), as implemented by specific regulations of the Department of Defense which prohibit conflicts of

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[2] The Court of Appeals stated:

> The plaintiff proposes an alternative basis on which it seeks to have contract 3366 voided. *Relying on what it identifies as the rationale of United States* v. *Mississippi Valley Generating Co., 364 U.S. 520, 81 S.Ct. 294, 5 L.Ed.2d 268 (1961), the plaintiff proposes that a general public policy against conflicts of interest is sufficiently strong to justify voiding a contract which arguably is tainted by such a conflict of interest.* We feel we must decline the invitation to develop such a novel "Federal common-law of Government procurement," premised upon what a court can be persuaded is desirable procurement policy. [App. A, p. 30a fn. 26; Emphasis added.]

interest in federal procurement, *viz.*, § 1-113.2 and Appendix G of the Armed Services Procurement Regulation (ASPR), 32 CFR § 1.113-2 and Part 141 (1971), is applicable to the Government contracts involved in this case.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are the Armed Services Procurement Act of 1947, 62 Stat. 21 (1948), 10 U.S.C. § 2304 *et seq.* (1970), as implemented by § 1-113.2 and Appendix G of the Armed Services Procurement Regulation (ASPR), 32 CFR § 1.113-2 and Part 141 (1971). The regulations appear in Appendix C to this petition, *infra* at pages 41a-52a.

STATEMENT OF THE CASE

On September 13, 1971, Hayes International Corporation ("Hayes"), petitioner herein, brought this action in the United States District Court for the Northern District of Alabama, Southern Division, for declaratory and injunctive relief to set aside as illegal and void a Government contract awarded by the respondent, Secretary of the Air Force, to the Boeing Company ("Boeing"). The contract, designated No. F34601-71-C-3366, is for certain maintenance, modification and related services on the worldwide Air Force fleet of KC-135 aerial tankers. Contracts of this type are referred to in the industry as "IRAN/Modification" contracts.

The essence of petitioner's case is that respondent's action of awarding the subject IRAN/Modification contract to Boeing (through his subordinate chain of command in the Department of Defense) resulted in an *inherent and illegal conflict of interest.* The con-

flict of interest exists because Boeing is required to perform under the IRAN/Modification contract that same work which Boeing recommends, influences and determines for the Air Force under sustaining engineering and related support services contracts on the KC-135 fleet, acting as the "engineering arm" of the Air Force for the fleet. Simply stated, respondent has placed Boeing in a position to "write its own ticket" and serve its own monetary interest under the IRAN/Modification contract, at the expense of the integrity of the federal procurement system and at a potential cost to the American taxpayer of more than $200,000,000.

On September 30, 1971, the district court issued a preliminary injunction enjoining respondent from taking any action pursuant to the contract awarded to Boeing. On October 14, 1971, the Court of Appeals for the Fifth Circuit granted respondent's motion for a stay of the injunction pending appeal. Thereafter, petitioner moved the district court to vacate the preliminary injunction. Petitioner stated that it was in the " 'best interest of all the parties that this case proceed as quickly as possible to a judgment on the merits' inasmuch as the challenged contract was then scheduled to extend for as long as five years." (App. A, p. 4a) Petitioner's motion was granted.

The case was tried before the district court without a jury. The court held that it had jurisdiction of the case and that petitioner had standing to sue. On the merits, it held that Boeing did not enjoy an unfair competitive advantage in the bidding and was not party to a conflict of interest which might bias its judgment in performance of the contract.

On appeal to the Court of Appeals for the Fifth Circuit, the court affirmed the decision of the district court

on jurisdiction, but decided the case on the merits on different grounds. The court held that an unsuccessful bidder such as petitioner has standing under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), to challenge the award of a Government contract. However, the court never reached the central issue of conflict of interest. Rather, it accepted respondent's "administrative interpretation" that the federal regulations prohibiting organizational conflicts of interest were not "meant" to apply to the types of contracts involved in this case. (App. A, p. 24a) While acknowledging that these contracts arguably are "tainted" by a conflict of interest, the court held that there was no "general public policy" against conflicts of interest sufficiently strong to justify judicial intervention and voiding of the contracts.

REASONS FOR GRANTING THE WRIT

This case raises compelling issues of substantial importance to the operation and integrity of the federal procurement system. It presents to this Court *for the first time* major questions involving "organizational" (as opposed to "individual") conflicts of interest in federal procurement as it affects public policy and the public interest.

An organizational conflict of interest occurs when an "organization" (*i.e.*, a corporation, partnership, or proprietorship) holding a Government contract is, by virtue of work or services performed for the Government under that contract, or by virtue of privileged information acquired from the Government in the course of performance:

(1) Placed in a position where its judgment may be *biased;* or

(2) Given an *unfair competitive advantage* over other organizations with respect to future Government business; or

(3) Otherwise placed in a position where a *conflict of interest* exists between the performance of work or services for the Government in an impartial manner and the organization's own self-interest.

Although this is a *civil* case, it nonetheless follows in spirit and form the mandate of this Court in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), and *United States* v. *Acme Process Equipment Co.*, 385 U.S. 138 (1966). In those cases, the Court considered the public policy reflected in the federal conflicts of interest statutes. The Court stated in *Mississippi Valley* that the "primary purpose" of such statutes is to "guarantee the integrity of the federal contracting process and to protect the public." (364 U.S. at 565) The relief which petitioner seeks in this Court, and which the courts below denied, is "dictated by the public policy manifested" in the applicable procurement statutes and regulations. *Id.*

The decision of the Court of Appeals leaves open the question of whether there presently exists *any* viable remedy against a conflict of interest in the award and performance of a Government contract. According to the court below, only a narrow remedy exists for those cases within that court's and respondent's restricted reading of the federal regulations. The *public policy* against conflicts of interest—which traces its genesis to the common law—was thus said to be of no effect.

It is critical for this Court to reverse the decision below to make clear that the existing federal regulations, correctly interpreted, do protect the public

against conflicts of interest, and that in any event, the public policy against conflicts of interest and illegal contracts still applies.

The Court of Appeals decision also dramatically altered long accepted standards for statutory interpretation. By accepting as authoritative the administrative "interpretation" of the pertinent regulations, proffered in the course of litigation and after the controversy herein arose, the court ignored the plain language of the regulations and their legislative intent—even though acknowledging that a conflict of interest arguably existed. If the decision below is permitted to stand unreversed, Government personnel will hereafter be on notice that by way of "interpretation," they can effectively avoid compliance with regulations in the public interest governing their activities.

I. The Contract Awarded by Respondent to Boeing is Illegal and Void: The Court of Appeals Erred in Not Deciding on its Merits the Issue of Conflict of Interest.

Conflict of interest is central to this case. Petitioner contends that the IRAN/Modification contract awarded by respondent to Boeing is illegal and void as against public policy and the applicable federal regulations, and should have been set aside by the court below.

An "organizational" conflict of interest arises in this case because the maintenance and modification work on the KC-135 fleet performed by Boeing (an "organization") for the Air Force under contract No. F34601-71-C-3366 is and will be largely determined and influenced by *Boeing* pursuant to its recommendations to the Air Force under its concurrent and ongoing sustaining engineering contracts for the KC-135 fleet.

It is just this kind of conflict of interest which historically has been prohibited as against public policy and which the federal regulations against conflicts of interest were intended to prevent.

On June 23, 1971, respondent awarded the subject IRAN/Modification contract to Boeing, effective July 2, 1971. The contract price on the date of award was $12,294,894.16 for the first of five years of similar work requirements. The approximate total five-year cost to the Government was $60,000,000. At the time of the award of the contract, a "White House source" was quoted in *The Wichita Eagle and The Beacon*, a Wichita, Kansas newspaper,[3] dated July 3, 1971, to the effect that the contract could be worth nearly $200 million during the next five years." (Plf's Exh. 3-A)

Because of the obvious inconsistency between the Boeing bid and the White House report of the potential value of the contract to Boeing, petitioner's suspicions were understandably aroused and petitioner initiated an immediate inquiry concerning the overall relationship between Boeing and the Department of Defense (Air Force) with respect to the KC-135 fleet. At the same time, petitioner retained counsel to assist in this inquiry by obtaining documents pursuant to the Freedom of Information Act.

The contracts and other documentation which petitioner obtained in its inquiry revealed an extraordinarily close and privileged relationship between Boeing and the Air Force. Petitioner discovered that for many years prior to the bidding, Boeing and the Air Force were parties to a series of ongoing contracts

[3] Boeing planned to perform the contract at its Wichita, Kansas, facility.

whereby Boeing furnished the Air Force with sustaining engineering and related support services on the worldwide Air Force KC-135 fleet.

There was no real dispute below as to the nature of the services which Boeing performs for the Air Force under its sustaining engineering and support services contracts on the KC-135 fleet. The Court of Appeals described the Boeing-Air Force relationship as follows:

> For a number of years before contract 3366 was awarded Boeing had been under contract to the Air Force to supply sustaining engineering and related services for the KC-135 fleet. . . . The trial court found that *Boeing's relationship under the sustaining engineering and related support services contracts was essentially as the "engineering arm" of the Air Force for the KC-135 fleet.*
>
> Among its findings of fact, the trial court found: (1) as the contractor responsible for sustaining engineering for the KC-135 fleet, Boeing proposed a number of different modifications and improvements in the KC-135 design; (2) Boeing as part of its duties under the sustaining engineering contracts conducted a series of tests, evaluating fatigue stress, and other factors which affect the durability and usefulness of each aircraft; and (3) *Boeing was thus privy to technical data it generated as well as that provided by the Air Force.* It was undisputed that Boeing was responsible for recommending to the Air Force what priority should be placed on any particular set of repairs.
>
> The repairs and modifications which Boeing recommended to the Air Force comprised in part the work the IRAN/Modification contractor would perform. *Boeing was thus in a position to recommend changes and modifications to aircraft which*

would enhance the value of the IRAN/Modification contract it subsequently was awarded. [App. A, pp. 6a-8a; Emphasis added.]

The Court of Appeals thus found that the opportunity for Boeing to exercise biased judgment for its own monetary interest did in fact exist. It is this precise condition which creates an organizational conflict of interest. The only real dispute becomes a question of whether this conflict of interest is illegal.

Since, as found by the court below, "Boeing was thus in a position to recommend changes and modifications to aircraft which would enhance the value of the IRAN/Modification contract," can a conflict of interest be doubted? Can one reasonably conclude that Boeing did not benefit from *and use* for its monetary gain the "vital information" which the court below found that the Air Force provided to Boeing and which Boeing's competitors did not possess? Can one reasonably separate Boeing's role as advisor to the Air Force concerning modifications to the fleet from its dual and conflicting role as "competitive" bidder to perform the modifications? We think not. Boeing held an unfair competitive advantage and utilized it.

The nub of the matter is that a conflict of interest exists because Boeing has gained a substantial *economic stake* in recommending to the Air Force under its sustaining engineering contracts specific modifications which Boeing will accomplish under the IRAN/Modification contract. This is a classic case of "the left hand feeding the right" and of a conflict of interest.

The evidence before the court below went far beyond a mere description of the conflict of interest *potential* in the Boeing/Air Force privileged and dual relation-

ship. Petitioner obtained documents on discovery which evidenced *actual changes* which were made to the subject contract after its award in June, 1971 by respondent to Boeing. *These changes involve expenditures in the $200,000,000 range referenced by the unnamed "White House source" at the time of award.*

The Court of Appeals stated:

> At trial *Hayes proved that Boeing recommended three specific sets of modifications which had the effect of greatly increasing the value of the IRAN/Modification contract it obtained, information which neither of its competitors possessed at the time of bidding.* These three sets of repairs involved alterations to the aerial boom,[7] and two sets of wing modifications. One of the wing modifications is actually being performed by Boeing under its IRAN/Modification contract, as is the aerial boom modification but the most substantial repair, Wing Fatigue Package V (which was valued as being in excess of $200,000,000) was awarded to Boeing subsequent to the filing of this litigation on a sole source basis.[8]

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[7] The aerial boom is the nozzle by which fuel is transferred in mid-air from the KC-135 tanker to other aircraft. The alterations in it which Boeing performs under its IRAN/Modification contract have an estimated cost of $2,000,000.

[8] The two sets of wing modifications were issued in the form of so-called "Wing Fatigue packages," both of which Boeing performed. Wing Fatigue Package IV was issued to Boeing under the IRAN/Modification contract 3366. *Wing Fatigue Package V involved far more extensive changes in the wings of every KC-135 aircraft, and at a unit price of $313,934.00 amounts to a total cost for a modification of the entire fleet of over $200,000,000.* This modification was later issued to Boeing under a separate contract, No. F34601-72-C-4213-PZ0003, as opposed to being assigned to Boeing under its IRAN/Modification contract.[4] [App. A, pp. 9a-10a; Emphasis added.]

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[4] The Court of Appeals correctly noted that the Wing Fatigue Package V modification was known by the contracting officer to be

It is difficult to conceive of a case where the facts more demonstrably evidence a conflict of interest, or where judicial intervention is more appropriate. Even assuming (as we do *not*) that the federal regulations prohibiting conflicts of interest were inapplicable to the "types of contracts" involved herein, no reasonable basis exists for the Court of Appeals' refusal to recognize and enforce the established public policy against illegal contracts.

It is fundamental under common and statutory law that a contract against public policy is void and illegal. 6A Corbin § 1375 (1962 ed.) Clearly, there is a public policy against a Government contract which embodies or creates a conflict of interest.

Petitioner does not seek to develop what the Court of Appeals referred to as a "novel" federal common law of Government procurement. (App. A, p. 30a fn 26) That "federal common law" is *not* novel but has been recognized specifically by this Court and most of the lower federal courts. *See Priebe & Sons, Inc.* v. *United States,* 332 U.S. 407, 411 (1947); *United States* v. *Wegematic Corp.,* 360 F.2d 674, 676 (2d Cir. 1966); *Northern Helex Co.* v. *United States,* 197 Ct. Cl. 118, 130, 455 F.2d 546, 553 (1972). It is an essential and established ingredient to the overall operation of the federal procurement system. All petitioner seeks in this case is to obtain *enforcement* of

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worth in excess of $200,000,000. He awarded a separate contract to Boeing for that modification and thereby avoided substantially increasing the price of the IRAN/Modification contract which was still in litigation before the court. This was for the administrative convenience of the Government. Fatigue Package V could have been accomplished by issuance of a change under the IRAN/Modification contract.

the law to prevent performance by Boeing under the patently illegal contract awarded to it by respondent. Judicial intervention to this end is critical to maintain the honesty and integrity of the federal procurement system.

II. The Court of Appeals Erred in Accepting Respondent's Interpretation That the Federal Organizational Conflict of Interest Regulations Are Inapplicable to This Case.

According to the Court of Appeals,

> the issue in this case comes down to the relatively straightforward one of the extent to which the Department of Defense rules on avoidance of organizational conflicts of interest were meant to apply to the type of engineering contracts which Boeing held for the KC-135. [App. A, p. 24a]

We have indicated that regardless of the applicability of the federal regulations, the IRAN/Modification contract awarded by respondent to Boeing is void and illegal as against public policy. In any event, however, the Court of Appeals clearly erred in accepting respondent's self-serving "interpretation" that the regulations were not "meant" to apply to the type of contracts involved in this case.

The Armed Services Procurement Act of 1947, as amended, is the basic organic statute which authorizes the Department of Defense to issue regulations governing federal procurement. These regulations are known collectively as the Armed Services Procurement Regulation (ASPR) and are codified in Title 32 of the Code of Federal Regulations. The provisions of the Armed Services Procurement Regulation have the full force and effect of statutory law. *Paul* v. *United States,* 371 U.S. 245 (1963). *See G. L. Chris-*

tian and Associates v. *United States,* 160 Ct. Cl. 1, 312 F.2d 418, *rehearing denied,* 160 Ct. Cl. 58, 320 F.2d 345, *cert. denied,* 375 U.S. 954 (1963).

Section 1-113.2 of ASPR (32 CFR § 1.113-2 (1971)) concerns organizational conflicts of interest. It mandatorily requires that "action must be taken" by the agencies and subentities of the Department of Defense to prevent such conflicts of interest from arising under defense contracts. Appendix G of ASPR (32 CFR Part 141 (1971)) sets forth the Rules for the Avoidance of Organizational Conflicts of Interest. These ASPR provisions codify the established common law public policy against illegal contracts.

The Court of Appeals completely misread and misinterpreted the conflict of interest regulations. Contrary to the court's decision, nothing at all in ASPR § 1-113.2 or Appendix G even remotely suggests that the regulations or the Rules for the Avoidance of Organizational Conflicts of Interest apply or were intended to apply only to research and development contracts, as alleged by respondent;[5] or that sustaining engineering and support services contracts, or IRAN/Modification contracts, are excepted from compliance therewith; or that they apply only to contractors who perform "systems engineering" and "technical direction."[6] The Court of Appeals accepted

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[5] Even if that were true, respondent's own internal regulations indicate that the Air Force Logistics Command, which issued the subject contract, does, in fact, engage in research and development in the maintenance and modification of aircraft. (Def.'s Exh. 12)

[6] To the contrary, ASPR also makes its organizational conflict of interest regulations applicable to contracts for architect-engineer services and mandatorily prohibits the awarding of a construction

respondent's narrow and self-serving reading of the regulations, without recognizing that in doing so it rendered them a nullity at the Government's discretion.

Appendix G states that: "[Conflict of interest] arises in several forms—not all of which are by any means yet fully understood." The Appendix was made part of the Armed Services Procurement Regulation in 1962. This case contributes substantially to a better understanding of the "forms" and circumstances which give rise to organizational conflicts of interest.[7] The Rules for the Avoidance of Organizational Conflicts of Interest set forth in Appendix G warn:

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contract to the architect-engineer. (ASPR § 18-115, 32 CFR § 18.115 (1974)) Clearly, architect-engineer contracts are unrelated to the concept of "systems engineering/technical direction" and are *not* for research and development.

The only reference to systems engineering and technical direction in the ASPR provisions governing organizational conflicts of interest appears in Rule 1 of Appendix G. The Rules are only examples of possible conflict of interest situations and thus the facts of this case need not be artificially fashioned to comply therewith. Nevertheless, this case does come within Rule 1. The "system" to which Rule 1 applies herein is the weapons system consisting of the KC-135 fleet of aircraft. Pursuant to its sustaining engineering and other related support services contracts on the KC-135 fleet, Boeing performs systems engineering and technical direction on this "system" within the contemplation of Rule 1 and thus comes within the prohibitions of that Rule.

[7] The National Aeronautics and Space Administration (NASA), like the Department of Defense, derives its procurement authority in part from the Armed Services Procurement Act of 1947. For a number of years, the NASA Procurement Regulations incorporated the same Appendix G language as did ASPR. In 1971, NASA replaced Appendix G with a simplified regulation. That regulation states that it has been NASA's experience that organizational conflicts of interest "most frequently" have their origin in support services contracts. (41 CFR § 18-1.113-2(b)(1974)) It makes no distinction as to the type of services involved.

> The following rules state general prohibitions which are then explained and illustrated by specific examples. *There will undoubtedly occur cases which are not resolved by these rules.* . . . The following rules and examples are not all inclusive but merely attempt to achieve these two goals in a variety of situations. [Emphasis added.]

The "two goals" referred to in the quoted paragraph above, which the Rules state "should be paramount" in determining the existence of a conflict of interest, are: 1) "preventing conflicting roles which might bias a contractor's judgment"; and 2) "preventing unfair competitive advantage." The Rules state that, "the ultimate test should always be: Is the contractor placed in a position where his judgment may be biased, or where he has an unfair competitive advantage? If so, corrective action must be taken. . . ."

The federal regulations dictate that contracting "organizations" should not be "permitted to develop a privileged relationship to the Department of Defense." (ASPR Appendix G) A contractor such as Boeing which functions—under non-competitive sole source contracts—as the "engineering arm" of the Air Force for a major weapons system, and has access to "vital" Government information unavailable to its competitors, has such a "privileged" relationship with that Department and thereby gains an unfair competitive advantage.

The Court of Appeals erroneously described the Boeing sustaining engineering contracts as requiring mere "fix-it" engineering, compared with the allegedly more "sophisticated" contracts to which the regulations were "meant" to apply. This is completely in-

consistent with the Government's own rationale for employing Boeing as a sustaining engineering contractor for the KC-135 fleet, namely, that the Air Force does not have the technical expertise to perform the sustaining engineering functions and, accordingly, has no choice but to rely on what Boeing recommends.

Significantly, the Supreme Court has considered the question of conflict of interest arising in federal procurement, albeit in different circumstances. In *United States* v. *Mississippi Valley Generating Co., supra,* this Court rejected arguments which would have restrictively limited application of the federal employees' conflict of interest statute, 18 U.S.C. § 434 (1970). This is exactly what the Court of Appeals did in this case by restrictively limiting application of the federal procurement organizational conflict of interest regulations. In *Mississippi Valley,* this Court stated:

> The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, *a maxim which is especially pertinent if one of the masters happens to be economic self-interest.* [364 U.S. at 349-51; Emphasis added.]

The Court of Appeals recognized the nature of the conflict of interest opportunity and potential which Boeing's privileged relationship with the Air Force afforded. The reasonable and necessary *result* of that relationship is the conflict of interest and unfairly competitive bid. The mere *existence* of that relationship is inimical to the public interest. Along these same lines, this Court stated in *Mississippi Valley,* as follows:

> This broad proscription embodies a recognition of the fact that *an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.* To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. [364 U.S. at 549-50; Emphasis added.]

Insofar as serving the public interest, there is no difference between personal economic interests as they affect an individual (*Mississippi Valley*) and economic interests as they affect Government contractors such as Boeing. The end result is the same.

Finally, in *Mississippi Valley* this Court held that the invalidation and non-enforcement of the tainted contract was essential to effectuate the public policy which the conflict of interest statute reflected, notwithstanding that the statute did not specifically provide for invalidation and non-enforcement. (364 U.S. at 564-65) For the same reason, it is essential that the illegal contract awarded by respondent to Boeing be voided to preserve the integrity of the procurement system and to implement the strong public policy against conflicts of interest.

CONCLUSION

In summary, the Court of Appeals for the Fifth Circuit erred in not reaching directly the conflict of interest issue in this case, and in deciding that the respondent properly interpreted as inapplicable to the Government in this case the federal regulations which prohibit organizational conflicts of interest.

For the foregoing reasons, a Writ of Certiorari should be issued to review the decision of the Court of Appeals.

Respectfully submitted,

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